

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

MIRTH M. WYATT

Claimant

VS.

W. H. BRAUM, INC.

Respondent

Self-Insured

)
)
)
)
)
)
)

Docket No. 259,570

ORDER

Respondent appeals the November 28, 2000, preliminary hearing Order of Administrative Law Judge John D. Clark wherein claimant was granted benefits for an accidental injury occurring on September 17, 2000. The Administrative Law Judge found that claimant had proved accidental injury arising out of and in the course of her employment and had provided timely notice of her injuries to respondent. Medical treatment with Eustaquio Abay, II, M.D., as the authorized treating physician and temporary total disability compensation were ordered.

ISSUES

- (1) Did claimant suffer accidental injury arising out of and in the course of her employment with respondent on the date alleged?
- (2) Did claimant provide notice of the accidental injury to respondent as required by K.S.A. 44-520?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Based upon the evidence presented and for the purpose of preliminary hearing, the Appeals Board finds the Order of the Administrative Law Judge should be reversed and benefits to claimant should be denied.

Claimant alleges accidental injury on September 17, 2000, when she bent over to pull two gallons of milk from the back of a display case to the front. Claimant testified she felt a twinge or pulling sensation in her right arm and shoulder similar to a rubber band snapping. Claimant worked the remainder of her shift that day. Claimant testified that she

advised Kymberly Wright, respondent's store manager, of the accident. Ms. Wright denied being told of any injury suffered by claimant at that time.

Claimant returned to work on September 18, 2000, and performed her regular duties for respondent. After leaving respondent's employment on the 18th, claimant went to her other job where she worked as a grill cook with Daisy Mae's Café. Claimant worked one or two days for Daisy Mae's.

On September 20, 2000, claimant went to a local chiropractor by the name of Jeff Wood, D.C., and received a treatment involving chiropractic manipulation. Claimant had been to chiropractors before; however, this was the first time she had ever been treated by Dr. Wood. The medical report of Dr. Wood dated September 20, indicates claimant was complaining of arm pain primarily on the right side. Dr. Wood tested claimant's cervical spine range of motion and, finding it decreased, treated both the cervical spine and the arm.

After the chiropractic treatment, claimant was in such severe pain that she was forced to go to the emergency room at William Newton Memorial Hospital in Winfield, Kansas, for pain medication injections. Medical records from the emergency room discuss the fact that claimant had right shoulder and arm pain, with pain radiating down the right arm. The emergency room records document the fact she received a chiropractic manipulation that day, but fail to mention any work-related injury. Likewise, Dr. Wood's report of September 20 fails to mention any work-related injury.

The first mention of a work-related accident is contained in the September 25, 2000, medical report of chiropractor Jerome F. Mangen, D.C. Dr. Mangen's report discusses both the milk incident, which claimant described as a pull in her right upper back and shoulders, and the chiropractic treatment. Claimant told Dr. Mangen that, after she received the adjustment by Dr. Wood, she "really hurt afterward."

Claimant returned to Dr. Mangen for additional treatment on September 27, 2000. On that date, she advised the doctor that she had done "too much yesterday". She detailed mopping her floor, cleaning her bathtub and carrying in "a lot of groceries" as the precipitating cause of her increased symptoms.

Respondent's manager, Ms. Wright, testified that she was not made aware either on the 17th of September or the 18th of September that claimant suffered any type of injury. The first time she was told that claimant had alleged any type of injury at work was on October 2, 2000, when she was contacted by her corporate headquarters and advised claimant was filing a workers compensation claim. On that date, at corporate headquarters' instructions, she prepared an accident report detailing claimant's allegations of injury. October 2, 2000, is more than 10 days after September 17, 2000.

Claimant was referred to a series of doctors, including medical doctors and internists. She underwent a series of examinations which led to a diagnosis of a herniated disc at C5-6 on the right and a bulging disc at C4-5. Claimant underwent epidural steroid injections and, at the hearing, was requesting a referral to Dr. Abay in Wichita for possible surgery.

In workers compensation litigation, it is claimant's burden to prove by a preponderance of the credible evidence her entitlement to the benefits claimed. See K.S.A. 44-501 and K.S.A. 44-508(g).

When a primary injury under the Workers Compensation Act is shown to have arisen out of and in the course of employment, every natural consequence that flows from the injury, including a new and distinct injury, is compensable if it is the direct and natural result of the primary injury. Jackson v. Stevens Well Service, 208 Kan. 637, 643, 493 P.2d 264 (1972). However,

The rule in *Jackson* is limited to the results of one accidental injury. The rule was not intended to apply to a new and separate accidental injury such as occurred in the instant case. The rule in *Jackson* would apply to a situation where a claimant's disability gradually increased from a primary accidental injury, but not when the increased disability resulted from a new and separate accident. Stockman v. Goodyear Tire & Rubber Co., 211 Kan. 260, 263, 505 P. 2d 697 (1973).

It is claimant's burden to show her entitlement to the benefits requested. Claimant alleges an accidental injury on September 17, 2000. During claimant's testimony, she identified three persons with whom she allegedly discussed this accident. Ms. Wright, claimant's supervisor, testified and denied any knowledge of the accident. Claimant also mentioned coworkers named Karen and Daniel, neither of whom testified in this matter.

It is significant that claimant finished her shift on September 17 and returned to work a full shift on September 18, exhibiting no symptoms of pain on either day. Claimant then went to her other part-time job as a grill cook at Daisy Mae's and worked there before her manipulation with Dr. Wood on September 20. It was only after this manipulation occurred that claimant began experiencing the severe symptoms which necessitated her trip to the emergency room on the evening of September 20 for the pain medication injection.

The Appeals Board finds claimant's testimony regarding the accident and resulting symptoms to not be credible.

K.S.A. 44-520 obligates that a worker provide notice to an employer of an accidental injury within 10 days of the accident. Of the three people claimant identified as being told

about this accident, only one, Kymberly Wright, claimant's supervisor, testified. Ms. Wright denied any information regarding claimant's accidental injury until she was contacted by her corporate headquarters on October 2, 2000. The Appeals Board does not find claimant's allegation that she discussed this matter with Ms. Wright to be persuasive.

The Appeals Board finds the Order of the Administrative Law Judge granting claimant ongoing medical treatment and temporary total disability compensation should be reversed. Claimant has failed to prove she suffered accidental injury arising out of and in the course of her employment with respondent on the date alleged and has failed to prove that she provided timely notice of accident as is required by K.S.A. 44-520.

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Order of Administrative Law Judge John D. Clark dated November 28, 2000, should be, and is hereby, reversed.

IT IS SO ORDERED.

Dated this ____ day of March 2001.

BOARD MEMBER

c: Robert R. Lee, Wichita, KS
John F. Carpinelli, Topeka, KS
John D. Clark, Administrative Law Judge
Philip S. Harness, Director